

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

AMERICAN LITTORAL SOCIETY and)

SIERRA CLUB,)

Plaintiffs,)

C. A. No. 96-591 (SLR)

v.)

UNITED STATES ENVIRONMENTAL)

PROTECTION AGENCY; CAROL M.)

BROWNER, ADMINISTRATOR; UNITED) -

STATES ENVIRONMENTAL PROTECTION)

AGENCY, REGION III; and W. MICHAEL

McCABE, REGIONAL ADMINISTRATOR,)

Defendants.)

CONSENT DECREE -

WHEREAS on April 2, 1996, American Littoral Society sent a 60-day Notice of *Intent* to Sue to the United States Environmental Protection Agency ("EPA") alleging various violations of Section 303(d) and (e) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1313(d) and (e), and Section 7 of the Endangered Species Act, 16 U.S.C. § 1536;

WHEREAS on August 23, 1996, American Littoral Society and Sierra Club ("Plaintiffs") filed a complaint in the Eastern District of Pennsylvania (Civ. A. No. 96-5920) against EPA, Carol Browner in her official capacity as Administrator of EPA, and W. Michael McCabe in his official capacity as the Administrator of Region III of EPA, pursuant to Section 505(a) of the CWA for EPA's alleged failure to comply with Section 303(d) and (e) of the CWA, 33 U.S.C. § 1313(d) and (e), and for alleged acts and

omissions in violation of the Administrative Procedure Act ("APA") , 5 U.S.C. § 551 et seq.;

WHEREAS on December 1, 1996, the United States District Court for the Eastern District of Pennsylvania transferred this action to the District of Delaware pursuant to 28 U.S.C.

§ 1404(a), and this Court docketed this case on December 5, 1996, C.A. No. 96-591;

WHEREAS on April 4, 1997, Plaintiffs sent a Supplemental Notice of Intent to Sue;

WHEREAS Plaintiffs supplemented their complaint on April 18, 1997, alleging additional violations of the CWA and the Endangered Species Act ("ESA"), 16 U.S.C. § 1536;

WHEREAS Section 303(d) of the Act, 33 U.S.C. § 1313(d), and EPA's implementing regulations, 40 C.F.R. § 130.7(b)-(e), provide for: (1) identification of waters for which applicable technology-based effluent limitations and other controls are not stringent enough to implement water quality standards that still require total maximum daily loads ("TMDLs") (the "Section 303(d) list"); (2) establishment of a priority ranking for such waters; (3) establishment of TMDLs for pollutants for which those waters are not in attainment with water quality standards; and (4) estimation of total maximum daily thermal loads ("TMDTLs") for those waters that are not in attainment with water quality standards related to temperature.

WHEREAS Section 303(e) of the Act, 33 U.S.C. § 1313(e), and EPA's implementing regulations, 40 C.F.R. § 130.5, provide for

EPA's approval or disapproval and review from time to time of a state's continuing planning process ("CPP") for the purpose of insuring that such planning process is at all times consistent with the CWA;

WHEREAS Section 7(a) of the ESA, 16 U.S.C. §1536(a), provides for interagency consultation under certain circumstances and for the carrying out of programs for the conservation of endangered species and threatened species listed pursuant to Section 4 of the ESA, 16 U.S.C. § 1533;

WHEREAS Section 10 of the APA, 5 U.S.C. § 706, provides for judicial review of agency actions that are arbitrary or capricious, contrary to law, or unlawfully delayed or withheld;

WHEREAS the Plaintiffs alleged the following in this matter:

1. EPA's failure to perform its mandatory duty to disapprove Delaware's 1992 Section 303(d) list violates the CWA;

2. EPA's approval of Delaware's 1992 Section 303(d) list violates the APA;

3. EPA's failure to disapprove Delaware's constructive submission of no 1994 Section 303(d) list violates the CWA;

4. EPA's failure to disapprove Delaware's constructive submission of no 1994 Section 303(d) list violates the APA;

5. EPA's failure to approve or disapprove Delaware's 1996 Section 303(d) list violates the CWA;

6. EPA's failure disapprove Delaware's constructive submission of no 1996 Section 303(d) list violates the APA;

7. EPA's failure to perform its mandatory duty to identify

and prioritize all water quality limited segments ("WQLSs") in Delaware violates the CWA;

8. EPA's failure to identify and adequately prioritize all WQLSs in Delaware violates the APA;

9. EPA's failure to perform its mandatory duty to establish TMDLs and to estimate TMDTLs for all WQLSs in Delaware violates the CWA;

10. EPA's failure to establish TMDLs and to estimate TMDTLs for all WQLSs in Delaware violates the APA;

11. EPA's failure to approve or disapprove Delaware's CPP and then review it from time to time thereafter violates the CWA;

12. EPA's failure to approve or disapprove Delaware's CPP and review it from time to time thereafter violates the APA;

13. EPA must withdraw Delaware's NPDES permitting authority until the State has an approved CPP;

14. EPA's granting of NPDES permitting authority to Delaware in the absence of a CPP violates the APA;

15. EPA's failure to perform its mandatory duty to disapprove Delaware's 1996 Section 303(d) list violates the CWA;

16. EPA's approval of Delaware's 1996 Section 303(d) list violates the APA;

17. EPA's failure to perform its mandatory duty to identify and prioritize all WQLSs in Delaware violates the CWA;

18. EPA's failure to identify and adequately prioritize all WQLSs in Delaware violates the APA;

19. EPA's failure to perform its mandatory duty to

establish TMDLs and to estimate TMDTLs for all WQLSs in Delaware violates the CWA;

20. EPA's failure to establish TMDLs and to estimate TMDTLs for all WQLSs in Delaware violates the APA;

21. EPA's failure to consult and confer with the Secretary prior to taking any action required by Section 303(c) of the CWA violates the ESA;

22. EPA's failure to consult and confer with the Secretary prior to taking any action required by Section 303(c) of the CWA violates the APA;

23. EPA's failure to consult and confer with the Secretary prior to taking actions required by Section 303(d) of the CWA violates the ESA;

24. EPA's failure to consult with the Secretary prior to taking action regarding Delaware's Section 303(d) lists violates the APA;

25. EPA's failure to consult with the Secretary prior to taking any action required by Section 303(e) of the CWA violates the ESA; and

26. EPA's failure to consult with the Secretary prior to taking any action required by Section 303(e) of the CWA violates the APA.

WHEREAS the State of Delaware has lead responsibility for the identification and prioritization of waters still requiring TMDLs and for establishment of TMDLs pursuant to Section 303(d) of the CWA;

WHEREAS 40 C.F.R. § 122.44(d)(1)(vii)(A) provides that, when developing water quality-based effluent limits, the permitting authority shall ensure that the level of water quality to be achieved by limits on point sources is derived from and complies with all applicable water quality standards;

WHEREAS 40 C.F.R. § 122.44(d)(1)(vii)(B) provides that, when developing water quality-based effluent limits, the permitting authority shall ensure that effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 C.F.R. § 130.7;

WHEREAS EPA intends to work with Delaware to assure that NPDES permits will be issued in compliance with 40 C.F.R. § 122.44 (d) (1) (vii) (A) and (B);

WHEREAS Plaintiffs reserve their rights under law to challenge NPDES permits issued by Delaware or EPA which do not comply with 40 C.F.R. § 122.44(d)(1)(vii)(A) or (B), and EPA and Delaware reserve any defenses they may have to such challenges;

WHEREAS CWA Section 303(d)(2) provides that states shall incorporate TMDLs into their current plan under subsection (e) of Section 303 of the CWA;

WHEREAS the parties understand that Delaware intends to establish TMDLs for all waters listed on the 1996 Section 303(d) list in accordance with the Whole Basin Management Plan for TMDL

Development ("Plan"), and further intends to incorporate into the Plan any waters listed on the 1998 Section 303(d) List, including those waters listed on the basis of data addressed in paragraph 4 of the Settlement Agreement;

WHEREAS in order to resolve this lawsuit, Plaintiffs and Defendants also have entered into a Settlement Agreement which has been filed separately with the Court for informational purposes only; its terms are not incorporated into this Decree and it is not an enforceable order of this Court;

WHEREAS Plaintiffs and Defendants have agreed to a settlement of this action without any admission of fact or law, which they consider to be a just, fair, adequate and equitable resolution of the claims raised in this action;

WHEREAS by entering into this Consent Decree, Plaintiffs and Defendants do not waive or limit any claim or defense, on any grounds, related to any final agency action taken pursuant to this Decree, including EPA's approval, disapproval, and/or development of Section 303(d) lists and/or establishment of TMDLs in Delaware;

WHEREAS it is in the interest of the public, the parties and judicial economy to resolve the issues in this action without protracted litigation, including a trial;

WHEREAS the Court finds and determines that this Consent Decree represents a just, fair, adequate and equitable resolution of the claims raised in this action;

NOW, THEREFORE, it is hereby ordered, adjudged, and decreed as follows:

I. GENERAL TERMS

1. The parties to this Consent Decree are Plaintiffs and Defendants. The parties understand that: (a) Carol Browner was sued in her official capacity as Administrator of the United States Environmental Protection Agency; (b) W. Michael McCabe was sued in his official capacity as the Administrator of Region III of the Environmental Protection Agency; and (c) the obligations arising under this Decree are to be performed by EPA and not by Carol Browner in her individual capacity or W. Michael McCabe in his individual capacity.

2. This Consent Decree applies to, is binding upon, and inures to the benefit of Plaintiffs (and their successors, assigns, and designees) and Defendants.

3. For purposes of entry and enforcement of this Consent Decree only, the parties to this Consent Decree agree that the Court has jurisdiction over this matter, the parties to the Decree, any disputes arising under this Decree, as well as any alleged violations of this Decree.

4. The parties agree that, for the purposes of this Decree, the following terms shall have the meanings provided below:

- A. "Continuing Planning Process" ("CPP") has the meaning provided in CWA Section 303(e), 33 U.S.C. § 1313(e), and 40 C.F.R. § 130.5, as of the date

of entry of this Decree or as subsequently amended.

- B. "EPA" means the United States Environmental Protection Agency.
- C. "Existing and readily available water quality related data and information" has the meaning provided at 40 C.F.R. § 130.7(b)(5), as of the date of entry of this Decree or as subsequently amended.
- D. "1996 Section 303(d) list" means the Section 303(d) list submitted by Delaware to EPA by letter dated November 21, 1996, and approved by EPA on December 17, 1996 (Attachment A hereto);
- E. "Plaintiffs" means American Littoral Society and Sierra Club.
- F. "Section 303 (d) list" means the final list of waters developed pursuant to Section 303(d) of the CWA and 40 C.F.R. § 130.7 for Delaware and either approved or established by EPA.
- G. "Subsequent Section 303(d) list" means any Section 303(d) list developed for Delaware subsequent to its 1996 Section 303(d) list and either approved or established by EPA during the pendency of this Consent Decree.
- H. "Total Maximum Daily Load" ("TMDL") has the meaning provided at 40 C.F.R. § 130.2(i) as of the

date of entry of this Decree, or as subsequently amended. For purposes of this Decree, the term "TMDL" includes a "total maximum daily thermal load" ("TMDTL"), and with respect to a TMDTL, the term "establishment" shall refer to "estimation" within the **meaning** of CWA Section 303(d)(1)(D).

- I. "United States" means the United States of America, **including** its officers, agencies, departments and instrumentalities.
- J. "Water Quality Limited Segment" ("WQLS") has the **meaning** provided at 40 C.F.R. S 130.2(j) as of the date of entry of this Decree, or as subsequently amended.
- K. "Water Quality Standard" ("WQS") has the *meaning* provided at 40 C.F.R. § 130.2(d), as of the date of entry of this Decree or as subsequently amended.

II. SECTION 303(D) LISTS

5. In reviewing Delaware's 1998 Section 303(d) list, EPA will consider, and address in its listing decision document and explain the basis for any EPA decision therein, whether Delaware has assembled and evaluated all existing and readily available chemical, physical and biological water quality-related data and **information** for waters violating applicable water quality - standards, *including* numeric and narrative criteria (including temperature criteria), waterbody uses, and anti-degradation

requirements. If EPA determines that Delaware has not assembled and evaluated all such data, EPA will either: (a) disapprove that aspect of such list and propose for public notice and comment a list that is based on such data, or (b) determine, pursuant to 40 C.F.R. § 130.7(b), that that aspect of such list may be approved and such data and information need not be assembled and evaluated.

III. ESTABLISHMENT OF TMDLS

6. (a) General Schedule. The parties understand that the State of Delaware has lead responsibility for the establishment of TMDLs pursuant to Clean Water Act Section 303(d), 33 U.S.C. § 1313(d). If Delaware fail's to establish TMDL3 for all pollutants for which all WQLSs are identified on Delaware's 1996 Section 303(d) list (except TMDLs for bacteria, which are to be established in accordance with paragraph 6(b) below) in each watershed according to the schedule set forth in Attachment B hereto, then EPA shall establish TMDLs for the balance of all pollutants for all WQLSs for which Delaware has not established TMDLs by December 15 of the year following the State's deadline, except that EPA shall establish all such TMDLs by December 15, 2006.

(b) Bacteria TIDLs. During the schedule set forth in Attachment B, EPA is under no obligation to establish TMDLs for bacteria for WQLSs listed in whole or in part for bacteria on the 1996 Section 303(d) List. Subject to the proviso in the next sentence, if Delaware fails to establish TMDLs for bacteria for

all WQLSs in each basin according to the schedule set forth in Attachment C hereto, then EPA shall establish TMDLs for bacteria for the balance of all WQLSs for which Delaware has not established TMDLs by December 15 of the year following the State's deadline, except that EPA shall establish all such TMDLs by December 15, 2006. EPA is only obliged to establish TMDLs pursuant to this subparagraph (b) for WQLSs listed in whole or in part for bacteria on the 1996 Section 303(d) List that, in Delaware's water quality standards, are designated at the time of approval of the 1996 list: (1) for 'primary contact recreation' and/or (2) as 'harvestable shellfish waters.'

7. TMDLs for Specific WQLSs. (a) Subject to the proviso in subparagraph (b) below, if Delaware fails to do so, EPA shall establish TMDLs for all pollutants for which the following WQLSs are listed on the 1996 Section 303(d) List according to the following schedule:

- i. by December 15, 1997, the Fresh Tidal Reach
(Waterbody # DE010-001-02) of the Appoquinimink;
- ii. by December 15, 1998, the following segments
within the Inland Bays:
 - (a) Upper Indian River Bay (DE140-005);
 - (b) Indian River (DE140-006);
 - (c) Lower Indian River Bay (DE140-E01); and
 - (d) Rehoboth Bay (DE280-E01); and

iii. by December 15, 1998, the following segments within the Nanticoke Basin:

- (a) Lower Nanticoke River (DE240-001);
- (b) Upper Nanticoke River (DE240-002); and
- (c) Lower Broad Creek (DE050-001).

(b) For these WQLS, EPA is not obliged to establish TMDLs for bacteria and temperature according to the schedule found in paragraph 7(a) immediately above.

8. (a) For purposes of measuring EPA's compliance with the milestones described in paragraphs 6 and 7 above, EPA may count:

- (i) TMDLs that Delaware establishes and EPA approves, and
- (ii) TMDLs that EPA establishes.

(b) In fulfilling its obligations under this Consent Decree, EPA.is under no obligation to establish TMDLs for any pollutant(s) for which a WQLS is listed or for any WQLS(s) that EPA determines do not need TMDLs consistent with Section 303(d) of the Clean Water Act and its implementing regulations, including 40 C.F.R. 5 130.7(b), as amended, or are removed from a subsequent Delaware Section 303(d) list consistent with the provisions of the Clean Water Act and EPA's implementing regulations. Accordingly, for purposes of measuring EPA's

compliance with the milestones described in paragraphs 6 and 7 above, EPA may also count pollutants for which a WQLS is listed and/or WQLSs on Delaware's 1996 Section 303(d) list that:

- (i) are not included on a subsequent Section 303(d) list approved or established by EPA, consistent with CWA Section 303(d) and 40 C.F.R. § 130.7, as amended, and/or
- (ii) EPA determines do not need a TMDL, consistent with CWA Section 303(d) and 40 C.F.R. § 130.7, as amended.

(c) In order to address compliance with this paragraph, EPA shall identify in its annual report described in paragraph 20 below, among other things, the following:

- (i) the WQLSs for which EPA has established TMDLs in that year;
- (ii) the WQLSs for which in that year EPA has approved TMDLs submitted by Delaware; and
- (iii) any other WQLSs included on Delaware's 1996 Section 303(d) list for which EPA seeks to take credit in that year pursuant to subparagraphs (b) (i) or (b) (ii), including a description of the basis for each credit.

(d) The dates set forth herein for completion of TMDLs are the dates by which the TMDLs shall be established, including completion of a draft TMDL, public notice of the draft TMDL, consideration of public comment, and any necessary revisions, and

the EPA approval or establishment of the final TMDL.

IV. CONTINUING PLANNING PROCESS

9. By February 28, 1998, EPA will provide a copy of Delaware's CPP to Plaintiffs and publish a notice of its availability in the Federal Register. This notice will inform the public that by August 15, 1998, EPA will prepare and make available to interested parties for their review and comment its preliminary written summary of its review of the CPP. Following publication of the notice, interested parties may request copies of the CPP and EPA's preliminary written summary when available.

10. Beginning February 28, 1998, EPA will keep a current copy of Delaware's CPP at Region III for public review during the pendency of this Decree.

11. By August 15, 1998, EPA will review Delaware's CPP to determine whether it is consistent with CWA Section 303(e), 33 U.S.C. § 1313(e), and EPA's implementing regulations at 40 C.F.R. § 130.5, or as amended. By August 15, 1998, EPA will provide a preliminary written summary of EPA's review, including any recommendations for improvement, of the CPP to the Plaintiffs, Delaware and any other interested parties for comment. EPA will consider any comments it receives by October 1, 1998.

12. By December 15, 1998, EPA will determine whether the CPP is consistent with the CWA and its implementing regulations, and provide Plaintiffs and Delaware with a final written summary of EPA's review of the CPP that will include any recommendations for improvement.

13. If Delaware does not modify its CPP to be consistent with any EPA recommendations, the CWA and its implementing regulations, EPA shall take appropriate action as provided under the CWA and accompanying regulations.

14. By February 1, 1998, EPA will develop a final report evaluating and making any recommendations regarding Delaware's water quality monitoring and assessment program and Section 303(d) listing process. At least 60 days prior to finalizing the report, EPA will provide a preliminary copy of the report to Plaintiffs and Delaware for their comment. At that same time EPA will also make a copy available to other interested parties upon prior written request. EPA will consider any comments on the preliminary report submitted no later than 30 days after providing the preliminary report to the commenter(s).

15. EPA will consider the final report, among other things, to be existing and readily available water quality related data and information to be used in reviewing Delaware's 1998 Section 303(d) list and for determining whether the list can be approved under CWA Section 303(d) and EPA's implementing regulations.

VI. ENDANGERED SPECIES

16. Whereas EPA intends to insure that any of its actions is not likely to jeopardize the continued existence of any endangered species or threatened species listed pursuant to the ESA or result in the destruction or adverse modification of

critical habitat of any such species, and in the interest of avoiding jeopardy to the continued existence of any species proposed to be listed pursuant to the ESA or the destruction or adverse modification of critical habitat proposed to be designated for such species, EPA shall request information from the U.S. Fish and Wildlife Service ("FWS") and/or the National Marine Fisheries Service ("NMFS") as to whether any such species may be present in the area affected by any action EPA takes to approve or establish Delaware's 1998 Section 303(d) list, any subsequent Section 303(d) list, or TMDLs.

17. Prior to EPA taking final action to approve or to disapprove and promulgate itself the 1998 Section 303(d) list, any subsequent Section 303(d) list, or TMDLs for Delaware, EPA will provide a copy of such list or TMDL to FWS and/or NMFS, along with a transmittal letter that requests information from FWS and/or NMFS as to whether any endangered species or threatened species listed or proposed to be listed under the ESA may be present in the area affected by any action EPA takes to approve or establish a Delaware Section 303(d) list or TMDL, as described in paragraph 18 immediately below.

18. EPA's transmittal letter to FWS and/or NMFS for Delaware lists or TMDLs will include the following language:

"Accompanying this letter is a copy of the (CWA Section 303(d) list) (TMDL) (TMDTL) for EPA is providing this prior to taking final action in an effort to ensure that our respective reviews are

coordinated.

EPA is sending this letter as a means of insuring that any action it takes pursuant to section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), is not likely to jeopardize the continued existence of any listed or proposed threatened or endangered species or result in the destruction or adverse modification of any critical habitat of such species. Accordingly, EPA is requesting from (FWS) (NMFS) information as to whether any species which is listed or proposed to be listed may be present in the area affected by this action. Consistent with 33 U.S.C § 1313(d) (2), EPA intends to take final action on this (list) (TMDL) (TMDTL) within 30 days. Please provide us with any comments prior to that time."

19. EPA will consider any timely written comments of FWS and/or NMFS before approving, disapproving and/or establishing Delaware's 1998 Section 303(d) list, any subsequent Section 303(d) list, or any TMDL.

VII. COMPLIANCE REPORTING

20. Beginning in 1998 and continuing until the Decree terminates, -by January 31 of each year EPA will submit to Plaintiffs a report regarding the activities, including, among other things, those specified in paragraph 8(c), undertaken by EPA to comply with this Consent Decree during the previous federal fiscal year.

21. As part of the annual report described in paragraph 20 immediately above, EPA will include a list, based on existing and readily available water quality-related data and information that EPA receives, of Delaware waters for which TMDLs are developed either by EPA or Delaware. The list will indicate for each such water whether, based on such data, the applicable water quality standard(s) have been met. Waters for which TMDLs have been developed will be maintained on this list until such data shows that the applicable water quality standards have been met.

22. EPA will meet with the Plaintiffs at least once a year, if requested, to discuss progress in complying with this Decree.

VIII. EFFECTIVE DATA

23. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the District Court does not enter this Consent Decree, the obligations set forth in this Decree are null and void.

IX REMEDY SCOPE OF JUDICIAL REVIEW

AND CONTINUING JURISDICTION

24. Prior to seeking the remedy of contempt with respect to any EPA failure to perform its obligations in (i) paragraph 5 regarding review of Delaware's 1998 Section 303(d) list, and (ii) in paragraph 13 regarding the CPP, Plaintiffs must first petition the Court to order EPA to perform any such obligations.

EPA reserves all its defenses to any such petition. The parties agree that the remedy of contempt is not available for EPA's

failure to perform such obligations, but is available for EPA's violation of any order Plaintiffs obtain from the Court directing EPA to perform such obligations.

25. The parties agree that the remedies provided in paragraph 24 immediately above, including obtaining an order from the Court directing EPA to perform obligations and/or filing a motion for contempt, are not available: (1) to address the merits of EPA's actual approval, disapproval or establishment of TMDLs under this Decree; and (2) to address the merits of EPA's actual approval, disapproval or establishment of the 1998 Section 303(d) list or any subsequent Section 303(d) list. Plaintiffs' sole remedy regarding these matters is to challenge EPA's actual approval, disapproval or establishment of TMDLs or of Delaware's Section 303(d) lists under the Clean Water Act and/or the federal Administrative Procedure Act. EPA reserves all its defenses to any such suit or suits.

26. The Court retains jurisdiction for the purposes of resolving any disputes arising under this Consent Decree, and issuing such further orders or directions as may be necessary or appropriate to construe, implement, modify, or enforce the terms of this Consent Decree, and for granting any further relief as the interests of justice may require.

27. Nothing in this Consent Decree shall be construed to confer upon the Court jurisdiction beyond that specifically arising under this Decree to review any decision, either procedural or substantive, to be made by EPA pursuant to this

Consent Decree.

28. Nothing in this Decree alters or affects the standards for judicial review of final EPA action.

X. RELEASE BY PLAINTIFFS AND RESERVATION OF RIGHTS

29. Upon approval and entry of this *Consent* Decree by the Court, this Decree shall constitute a complete and final settlement of all claims that were asserted by Plaintiffs in the complaint filed in Civil Action Number 96-591.

30. Plaintiffs hereby release, discharge, and **covenant** not to assert (by way of the commencement of an action, the joinder of EPA in an existing action or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever, in law or in equity, that were asserted or should have been asserted under principles of res judicata by Plaintiffs in the complaint filed in Civil Action Number 96-591.

31. Except as provided in paragraph 30 immediately above, **nothing** in this Decree shall otherwise waive or limit the rights of Plaintiffs to bring any actions or claims regarding EPA's obligations in states other than Delaware, **including** but not limited to, the **ongoing** actions and claims in the District of New Jersey (C.A. No. 96-cv-339) and in the Eastern District of Pennsylvania (C.A. No. 96-489). EPA reserves all its defenses to such suits.

32. Plaintiffs reserve their rights to challenge in a separate lawsuit the merits of any action taken by EPA pursuant to this Decree, **including** but not limited to, the merits of EPA's

actual approval, disapproval or establishment of Section 303(d) lists or TMDLs or EPA's review of CPPs. EPA reserves all its defenses to such suits.

XI. TERMINATION OF CONSENT DECREE AND DISMISSAL OF CLAIMS

33. This Consent Decree shall terminate after fulfillment of all the obligations of EPA under this Consent Decree. Upon termination of this Decree, this case shall be dismissed with prejudice. EPA and Plaintiffs shall jointly file the appropriate notice with the Court so that the Clerk of Court may close the file.

XII. FORCE MAJEURE

34. The parties recognize that the performance-of this Consent Decree is subject to fiscal and procurement laws and regulations of the United States which include, but are not limited to, the Anti-Deficiency Act, 31 U.S.C. § 1341, at seq. The possibility exists that circumstances outside the reasonable control of EPA could delay compliance with the timetables contained in this Consent Decree. Such situations include, but are not limited to, a government shutdown such as occurred in 1995 and 1996, or catastrophic environmental events requiring immediate and/or time-consuming response by EPA. Should a delay occur due to such circumstances, any resulting failure to meet the timetables set forth herein shall not constitute a failure to comply with the terms of this Consent Decree, and any deadlines occurring within 120 days of the termination of the delay shall be extended one day for each day of the delay. EPA will provide

Plaintiffs with notice as soon as possible under the circumstances when it learns the facts upon which EPA seeks to invoke this term of the *Consent* Decree. EPA will also provide Plaintiffs with reasonable notice of the termination of the force majeure event upon which EPA invoked this term of the Decree. Any dispute regarding invocation of this provision shall be resolved in accordance with the dispute resolution provision of paragraph 35 immediately below. If challenged, EPA shall have the burden to demonstrate that force majeure was appropriately invoked.

XIII. DISPUTE RESOLUTION

35. In the event of a disagreement between the parties concerning the interpretation or performance of any aspect of this Decree, the dissatisfied party shall provide the other party with written notice of the dispute and a request for negotiations. The parties shall meet and confer in order to attempt to resolve the dispute within 30 days of the written notice, or such time thereafter as is mutually agreed. If the parties are unable to resolve the dispute within 60 days of such notice, or such time thereafter as is mutually agreed, then either party may petition the Court to resolve the dispute.

XIV. MODIFICATIONS

36. This *Consent* Decree may be modified by written agreement of the parties and approval of the Court. Nothing in this Decree, or in the parties' agreement to its terms, shall be construed to limit the equitable powers of the Court to modify

the terms of the Decree upon a showing of good cause by any party. Good cause includes, but is not limited to, changes in the law affecting EPA's actions under this Decree.

37. Any dates set forth in this Consent Decree may be extended by written agreement of the parties and notice to the Court. To the extent the parties are not able to agree to an extension, either party may seek a modification of this Decree in accordance with the procedures specified below.

A. If a party files a motion requesting a modification of a date or dates established by this Decree totaling more than thirty (30) days and provides notice to the other party at least thirty (30) days prior to filing such motion, and-files the motion at least sixty (60) days prior to the date for which modification is sought, then the filing of such motion shall, upon request, extend the date for which modification is sought. Such extension shall remain in effect until the earlier to occur of (i) a dispositive ruling by this Court on such motion, (ii) the date sought in the modification, or (iii) ninety (90) days after the original date for which modification is sought. The party may move the Court for a longer extension.

H. If a party files a motion requesting a modification of a date or dates established by this Decree totaling thirty (30) days or less, provides notice to the other party at least thirty (30) days prior to the filing of such motion, and files the motion at least seven (7) days prior to the

date for which modification is sought, then the filing of such motion shall, upon request, extend the date for which modification is sought. Such extension shall remain in effect until the earlier to occur of (i) a dispositive ruling by this Court on such motion, or (ii) the date sought in the modification.

C. If a party seeking a modification does not provide notice pursuant to subparagraphs A or B above, it may move the Court for a stay of the date for which modification is sought. The party seeking modification shall give notice to the other party as soon as possible of its intent to seek a modification and/or stay of the date sought to be modified. The notice provided under this subparagraph and any motion for stay shall demonstrate why the party seeking a modification could not have utilized the notification procedures set forth in subparagraphs A or B immediately above.

D. If the Court denies a motion by a party to modify a date established by this Decree, then the date for the required action shall be such date as the Court may specify.

E. Any motion under subparagraphs A or B to modify the schedule established in this Decree shall be accompanied by a motion for expedited consideration joined by both *EPA* and the Plaintiffs. If a party moves under subparagraph C to modify the schedule, that party may choose also to file a motion for expedited consideration, which the *non-moving* party may join and which the non-moving party shall not oppose in any event.

XV. AGENCY DISCRETION

38. Except as expressly provided herein, nothing in this Consent Decree shall be construed to limit or modify the discretion accorded EPA by the Clean Water Act, the Endangered Species Act, the Administrative Procedure Act, or by general principles of administrative law, including EPA's discretion to revise, amend or promulgate regulations.

39. Nothing in this Consent Decree shall be construed to limit or modify EPA's discretion after EPA performs any action pursuant to this Decree to alter, amend, or revise from time to time any such action.

XVI. COSTS

40. EPA agrees that Plaintiffs are the prevailing party and are entitled to reasonable attorneys' fees and costs accrued as of the date of this Decree. The parties will attempt to reach agreement as to the appropriate amount of the recovery. If they are unable to do so, Plaintiffs may file an application with the Court for the recovery of reasonable fees and costs within ninety (90) days of entry of this Decree, or such further time thereafter as mutually agreed by the parties.

ZVII. NOTICE

-
41. Any notice required or made with respect to this Consent Decree shall be in writing and shall be effective upon

receipt. For any matter relating to this Consent Decree, the contact persons are:

For the Plaintiffs:

Dery Bennett

Executive Director
American Littoral Society
Sandy Hook
Highlands, NJ 07732

Carl Solberg

Sierra Club
Box 1908
Dover, DE 19903

Maya van Rossum

Executive Director
Delaware Riverkeeper Network
P.O. Box 326
Washington Crossing, PA 18977

James R. May

Associate Professor of Law and
Director, Environmental Law Clinic
Widener University School of Law
4601 Concord Pike
P.O. Box 7474

Wilmington, DE 19802-0474

Edward Lloyd

Director, Environmental Law Clinic
University of Rutgers School of Law
15 Washington Street
Newark, NJ 07102

For the Defendants:

James H. Curtin

Office of General Counsel (2355)
U.S. *Environmental* Protection Agency
401 M Street, S.W.
Washington, DC 20460

Christopher Day

Office of Regional Counsel (3RC13)
U.S. *Environmental* Protection Agency
Region III
841 Chestnut Building
Philadelphia, PA 19107

Patricia Ross McCubbin
Environmental Defense Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

Upon written notice to the other parties, any party may designate a successor contact person for any matter relating to this Consent Decree.

XVIII. REPRESENTATIVE AUTHORITY

42. Each undersigned representative of the parties to this Consent Decree certifies that he or she is fully authorized by the party to enter into and execute the terms and conditions of this Consent Decree, and to legally bind such party to this Consent Decree. By signature below, the parties consent to entry of this Consent Decree.

XIX. MUTUAL DRAFTING

43. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by Plaintiffs and EPA. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree.

XX. COUNTERPARTS

44. This Consent Decree may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall

constitute one agreement. The execution of one counterpart by any party shall have the same force and effect as if that party had signed all other counterparts.

XXI. USE of CONSENT DECREE

45. This Consent Decree shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States, its officers, or any person affiliated with it.

XXII. COMPLIANCE WITH OTHER LAWS

46. No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 5 1341, or take actions in contravention of the Administrative Procedure Act, the Clean Water Act, or any other law or regulation, either substantive or procedural.

XXIII. APPLICABLE LAW

47. This Consent Decree shall be governed by and construed under the laws of the United States.

XXIV. THIRD-PARTY BENEFICIARIES

48. Nothing in this Consent Decree shall be construed to make any other person or entity not executing this Consent Decree a third-party beneficiary to this Consent Decree.

The parties consent to the form, substance and entry of the foregoing Consent Decree.

FOR THE DEFENDANTS AND THE UNITED STATES OF AMERICA:

Widener University School of Law
Environmental Law Clinic
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530
Associate Professor of Law and
Director, Environmental Law Clinic
Widener University School of Law
4601 Concord Pike
P.O. Box 7474
Wilmington, DE 19802-0474
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Washington, D.C. 20026
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15 Washington Street
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United States Attorney
District of Delaware
Local Counsel for Plaintiffs:

Edward Lloyd
Director
University of Rutgers School of Law
Environmental Law Clinic
15 Washington Street
Newark, NJ 07102
United States Attorney
District of Delaware
Local Counsel for Plaintiffs:

Christine M. McDermott
Dated: July 31, 1997 By: (signed)
Associate Professor of Law
Delaware Bar I.D. No. 84
Widener University School of Law
4601 Concord Pike
P.O. Box 7474
Wilmington, DE 19802-0474
PATRICIA HANNIGAN
Assistant United States Attorney
District of Delaware
Delaware Bar I.D. No. 2145
1201 Market Street
Suite 1100
Wilmington, DE 19801
On Consent Decree for Plaintiffs

Albert Greto for the Defendants
Matthew McKee
and the United States of America:
Student Attorneys,
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4601 Concord Pike
U.S. Environmental Protection Agency
401 M. Street, S.W.
Wilmington, DE 19802-0474
Washington, D.C. 20460

Christopher Day
Assistant Regional Counsel
U.S. Environmental Protection Agency,
Region III
841 Chestnut Street
Philadelphia, PA 19107

FOR THE PLAINTIFFS:

ORDER

UPON CONSIDERATION OF THE FOREGOING, the Court hereby finds that this Consent Decree is fair and reasonable, both procedurally *and* substantively, consistent with applicable law, *in good faith, and in* the public interest. THE FOREGOING Consent Decree is hereby APPROVED and ENTERED AS FINAL JUDGMENT.

SIGNED and ENTERED this 4th day of August, 1997.

(Signed)

SUE L. ROBINSON

Judge, U.S. District Court
District of Delaware

Attachment B - TMDL DEVELOPMENT SCHEDULE

The schedule below represents the dates for development and completion of all TMDLs by Delaware for all Water Quality Limited Segments (WQLSs) on the 1996 Section 303(d) List (not including those segments or component of those segments impaired by bacteria).

BASINS - CYCLE I	WATERSHED	YEAR OF COMPLETION
Piedmont	Brandywine, Christina, Red Clay, White Clay, Shellpot, Naamans Creek	Dec. 31, 1999
Chesapeake Bay	Broad Creek, Nanticoke	Dec. 31, 2000
Delaware Bay	Appoquinimink, Murderkill	Dec. 31, 2001
Delaware Estuary	Delaware River and Bay Zones 5 and 6	Dec. 31, 2002
Inland Bays	Indian River, Iron Branch, Lewes and Rehoboth Canal, Buntings Branch, Little Assawoman, Rehoboth Bay	Dec. 31, 2003

BASINS -- CYCLE 2	WATERSHED	YEAR OF COMPLETION
Piedmont	Phase II Brandywine, Christina, Red Clay, White Clay, Shellpot~ Naamans Creek	Dec. 31, 2004
Chesapeake Bay	Choptank, Chester, Marshyhope, Pocomoke	Dec. 31, 2005
Delaware Bay	Army Creek, Blackbird, Broadkill, Cedar Creek, C & D Canal (Lum's Pond), Dragon Run, Leipsic River, Little River, Mispillion River, Red Lion Creek, Smyrna River, St. Jones River	Dec. 31, 2006
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Delaware Estuary	Delaware Bay Zone 6	Dec. 31, 2006

Attachment C - BACTERIA TMDL DEVELOPMENT SCHEDULE

BASINS	YEAR OF COMPLETION
Piedmont	Dec. 31, 2004
Chesapeake Bay	Dec. 31, 2005
Inland Bays	Dec. 31, 2006
Delaware Estuary	Dec. 31, 2005
Delaware Bay	Dec. 31, 2006'